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THE INTERNATIONAL FLYING CONVENTION AND THE FREEDOM OF THE AIR

"The use of the sea and air is common to all."—QUEEN ELIZABETH

FOR the following text of the draft of the International Flying Convention as adopted by the Peace Conference we are indebted to the English journal *Flight* of July 24, 1919, the official text not having been published in the United States.¹

DRAFT OF INTERNATIONAL FLYING CONVENTION

The Air Ministry [of Great Britain and Ireland] on Tuesday [July 22, 1919] issued the text of the Convention relating to International Air Navigation [Cmd] agreed upon by the sub-commission dealing with aerial navigation at the Peace Conference.

The Convention has been agreed to by all the representatives, subject to certain reservations. The Convention has not been formally approved by the Supreme Council of the Peace Conference. It has, however, been agreed that it should be issued for the information of the public of the Allied and Associated States.

The following is the English text of the document, which is in English and French, both languages having equal validity:—

CHAPTER I. — GENERAL PRINCIPLES

ARTICLE 1. — The contracting States recognise that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters.

ARTICLE 2. — Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters as well as above the territories and territorial waters of its Colonies to the aircraft of the other contracting States, provided that the conditions established in this Convention are observed.

All regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

ARTICLE 3. — Each contracting State has the right, for military reasons or in the interest of public safety, to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

¹ Since this article was written the text both in French and English has been published as Senate Document No. 91, 66th Congress, 1st Session.

If it makes use of this right, it shall publish and notify beforehand to the other contracting States the location and extent of the prohibited areas.

ARTICLE 4. — Every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided in Paragraph 17 of Annex D and land outside the prohibited area as near to it as possible and as soon as possible at one of the aerodromes of the State unlawfully flown over.

CHAPTER II. — NATIONALITY OF AIRCRAFT

ARTICLE 5. — No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.

ARTICLE 6. — An aircraft possesses the nationality of the State on the register of which it is entered, in accordance with the provisions of Section I (c) of Annex A.

ARTICLE 7. — An aircraft shall not be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

An incorporated company cannot be the registered owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, and unless the president or chairman of the company and at least two-thirds of the directors possess the same nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of each State.

ARTICLE 8. — An aircraft cannot be validly registered in more than one State.

ARTICLE 9. — The contracting States shall every month exchange among themselves and transmit to the International Commission for Air Navigation copies of registrations and of cancellations of registration which shall have been entered on their official registers during the preceding month.

ARTICLE 10. — All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

CHAPTER III. — CERTIFICATES OF AIRWORTHINESS AND COMPETENCY

ARTICLE 11. — Every aircraft engaged in international navigation shall, in accordance with Annex B, be provided with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses.

ARTICLE 12. — The commanding officer, pilots, engineers, and other members of the operating crew of every aircraft shall, in accordance with Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

ARTICLE 13. — Certificates of airworthiness and of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses, in accordance with the regulations established by Annex B and Annex E and hereafter by the International Commission for Air Navigation, shall be recognised as valid by the other States.

Each State has the right to refuse to recognise for the purpose of flights within the limits of and above its own territory certificates of competency and licences granted to one of its nationals by another contracting State.

ARTICLE 14. — No wireless apparatus shall be carried without a special licence issued by the State whose nationality the aircraft possesses. Such ap-

paratus shall not be used except by members of the crew provided with a special licence for the purpose.

Every aircraft used in public transport and capable of carrying ten or more persons shall be equipped with sending and receiving wireless apparatus when the methods of employing such apparatus shall have been determined by the International Commission for Air Navigation.

This Commission may later extend the obligation of carrying wireless apparatus to all other classes of aircraft in the conditions and according to the methods which it may determine.

CHAPTER IV. — ADMISSION TO AIR NAVIGATION ABOVE FOREIGN TERRITORY

ARTICLE 15. — Every aircraft of a contracting State has the right to cross another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of signals provided in Annex D.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it notified to all the contracting States.

The establishment of international airways shall be subject to the consent of the States flown over.

ARTICLE 16. — Each contracting State shall have the right to reserve to its national aircraft the carriage of persons and goods for hire between two points on its own territory.

ARTICLE 17. — If a contracting State establishes restrictions of the kind permitted by Article 16, its aircraft may be subjected to the same restrictions in any other contracting State, even though the latter State does not itself impose these restrictions on other foreign aircraft.

Restrictions and reservations provided in Article 16 shall be immediately published, and shall be communicated to the International Commission for Air Navigation which shall notify them to the States interested.

ARTICLE 18. — The passage or transit of any aircraft with or without landing over or through the territory of any contracting State, including stoppages reasonably necessary for the purpose of such transit, shall not entail any seizure or detention of the aircraft by or on behalf of such State or any person therein, on the ground that the constitution or mechanism of the aircraft is an infringement of any patent, design, or model, duly granted or registered in such State. Every claim for an infringement of this kind shall be duly made in the country of origin of the aircraft.

CHAPTER V. — RULES TO BE OBSERVED ON DEPARTURE, ON LANDING, AND WHEN UNDER WAY

ARTICLE 19. — Every aircraft engaged in international navigation shall be provided: —

- (a) With a certificate of registration in accordance with Annex A.
- (b) With a certificate of airworthiness in accordance with Annex B.

(c) With certificates and licences of the commanding officer, pilots, and crew in accordance with Annex E.

(d) If it carries passengers, with a list of their names.

(e) If it carries freight, with bills of lading and manifest.

(f) With log books in accordance with Annex C.

(g) If equipped with wireless, with the special licence prescribed by Article 14.

ARTICLE 20. — The log books shall be kept for two years after the last entry.

ARTICLE 21. — Upon the departure of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

ARTICLE 22. — Upon the landing of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

ARTICLE 23. — All persons on board an aircraft shall conform to the laws and regulations of the State visited.

In case of flight made without landing, from frontier to frontier, all persons on board shall conform to the laws and regulations of the country flown over, the purpose of which is to ensure that the passage is innocent.

Legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft.

In case of crime or misdemeanor committed by one person against another on board an aircraft in flight the jurisdiction of the State flown over applies only in case the crime or misdemeanor is committed against a national of such State and is followed by a landing during the same journey upon its territory.

The State flown over has jurisdiction: —

(1) With regard to every breach of its laws for the public safety and its military and fiscal laws;

(2) In case of a breach of its regulations concerning air navigation.

ARTICLE 24. — Aircraft of the contracting States shall be entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft.

With regard to the salvage of aircraft wrecked at sea the regulations of the several contracting States as to the salvage of ships will apply so far as practicable.

ARTICLE 25. — Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft.

ARTICLE 26. — Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory, and that every aircraft under its flag, wherever it may be, shall comply with the regulations contained in Annex D of the present Convention. It will punish all persons who do not obey these regulations.

CHAPTER VI. — PROHIBITED TRANSPORT

ARTICLE 27. — The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. No foreign aircraft

shall be permitted to carry such articles between any two points in the same contracting State.

ARTICLE 28. — Each State may prohibit or regulate the carriage or use of photographic apparatus. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to all the other contracting States.

ARTICLE 29. — As a measure of public safety, the carriage of objects other than those mentioned in Articles 27 and 28 may be subjected to restrictions by each contracting State. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to all the other contracting States.

ARTICLE 30. — All restrictions mentioned in Article 29 shall be applied equally to national and foreign aircraft.

CHAPTER VII. — STATE AIRCRAFT

ARTICLE 31. — The following are deemed to be State aircraft: — (a) Military aircraft. (b) Aircraft exclusively employed in State service, such as posts, customs, police. Every other aircraft is a private aircraft. All State aircraft other than military, customs, and police aircraft shall be treated as private aircraft, and as such shall be subject to all the provisions of the present Convention.

ARTICLE 32. — Every aircraft commanded by a person in military service detailed for the purpose is deemed to be a military aircraft.

ARTICLE 33. — Neither the flight of a military aircraft of a contracting State over the territory of another nor its landing upon such territory shall be permitted without special authorization.

In case of such authorization the military aircraft shall enjoy in the absence of special stipulation the privileges of extritoriality which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is required or compelled to land shall, by reason thereof, acquire no right to extritoriality.

ARTICLE 34. — Agreements between State and State will determine in what cases police and customs aircraft can be authorized to cross the frontier. They shall in no case be entitled to the privileges of extritoriality.

CHAPTER VIII. — INTERNATIONAL COMMISSION FOR AIR NAVIGATION

ARTICLE 35. — There shall be instituted, under the name of the International Commission for Air Navigation and as part of the organization of the League of Nations, a permanent Commission composed of: —

Two representatives of each of the following States: The United States of America, France, Italy, and Japan;

One representative of Great Britain and one of each of the British Dominions and of India;

One representative of each of the other contracting States.

Each of the five States first-named (Great Britain, the British Dominions and India counting for this purpose as one State) shall have the least whole number of votes which, when multiplied by five, will give a product exceeding by at least one vote the total number of votes of all the other contracting States. All the States other than the five first-named shall each have one vote.

The International Commission for Air Navigation shall determine the rules of its own procedure and the place of its permanent seat, but it shall be free to meet in such places as it may deem convenient. Its first meeting shall take place at Paris. This meeting shall be convened by the French Government as soon as a majority of the signatory States shall have notified to it their ratification of the present Convention.

The duties of this Commission are: —

(a) To receive proposals from or to make proposals to any of the contracting States for the modification or amendment of the provisions of the present Convention and to notify changes adopted.

(b) To carry out the duties imposed upon it by the present Article and by Articles 9, 13, 14, 15, 17, 28, 29, and 38 of the present Convention.

(c) To amend the provisions of the technical Annexes.

(d) To collect and communicate to the contracting States information of every kind concerning international air navigation.

(e) To collect and communicate to the contracting States all information relating to wireless, meteorology and medical science which may be of interest to air navigation.

(f) To ensure the publication of maps for air navigation in accordance with the provisions of Annex F.

(g) To give its opinion on questions which the States may submit for examination.

Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three fourths of the total possible vote and shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the articles of the present Convention shall be examined by the International Commission for Air Navigation, whether it originates with one of the contracting States or with the International Commission for Air Navigation itself. No such modification shall be proposed for option by the contracting States, unless it shall have been approved by at least two-thirds of all the possible votes which could be cast if all the States were present.

All such modifications of the articles of the Convention (not of the provisions of the Annexes) must be formally adopted by the contracting States before they become effective.

The expenses of organisation and operation of the International Commission for Air Navigation shall be borne by the contracting States in proportion to the number of votes at their disposal.

The expenses occasioned by the sending of technical delegations will be borne by their respective States.

CHAPTER IX. — FINAL PROVISIONS

ARTICLE 36. — Each contracting State undertakes to co-operate as far as possible in international measures concerning: —

(a) The collection and dissemination of statistical, current, and special meteorological information, in accordance with the provisions of Annex G.

(b) The publication of standard aeronautical maps, and the establishment

of a uniform system of ground marks for flying, in accordance with the provisions of Annex F.

(c) The use of wireless in air navigation, the establishment of the necessary wireless stations, and the observation of international wireless regulations.

ARTICLE 37. — General provisions relative to customs in connection with international air navigation are the subject of a special agreement contained in Annex H to the present Convention.

Nothing in the present Convention shall be construed as preventing the contracting States from concluding, in conformity with its principles, special protocols as between State and State in respect of customs, police, posts, and other matters of common interest in connection with air navigation.

ARTICLE 38. — In the case of a disagreement of two or more States relating to the interpretation of the present Convention the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations and until its establishment by arbitration.

If the parties do not agree on the choice of the arbitrators, they shall proceed as follows:

Each of the parties shall name an arbitrator, and the two arbitrators shall meet to name a third. If the arbitrators cannot agree, the parties shall each name a third State, and the Third State so named shall proceed to designate the third arbitrator, by agreement or by each proposing a name and then determining by lot the choice between the two.

In case of the disagreement of two or more contracting States relating to one of the technical regulations annexed to the present Convention, the point in dispute shall be determined by the decision of the International Commission for Air Navigation by a majority of votes.

In case the difference involves the question whether the interpretation of the Convention or that of a regulation is concerned, final decision shall be made by arbitration as provided in the first paragraph of this Article.

ARTICLE 39. — In case of war, the provisions of the present Convention do not affect the freedom of action of the contracting States either as belligerents or as neutrals.

ARTICLE 40. — The provisions of the present Convention are completed by the Annexes A-H, which have the same effect and come into force at the same time as the Convention itself.

ARTICLE 41. — The British Dominions and India are deemed to be States for the purposes of the present Convention. Protectorates, or territories administered by the League of Nations or placed under its control, are, for the purposes of the present Convention, deemed to form part of the Protecting or Mandatory States, both as regards their territory and as regards their nationals.

ARTICLE 42. — The present Convention shall come into force as between any of the contracting States as soon as such States shall have exchanged ratifications, which shall take place within one year. The ratifications shall be deposited in the archives of the Ministry of Foreign Affairs of the French Republic.

ARTICLE 43. — The States which have not taken part in the present war shall be admitted to adhere to the present Convention upon their simple declaration notified to the Ministry of Foreign Affairs of the French Republic, which shall inform the contracting States of such adherence.

ARTICLE 44. — Any State which took part in the present War but which did not take part in the negotiation of this Convention may express its desire to adhere to this Convention and may be admitted to adhere to it, if such a State is a member of the League of Nations, or until January 1st, 1923, by a unanimous vote of the signatory and adhering States or, after January 1st, 1923, by an affirmative vote comprising at least three-fourths of the total possible votes of the signatory and adhering States, the votes of the different States having the same weight as that provided by Article 35 of this Convention for the International Commission for Air Navigation.

The Ministry of Foreign Affairs of the French Republic shall receive requests for adherence to this Convention under the conditions provided by this article, shall communicate them to the contracting States, shall receive the votes of the contracting States, and shall announce the result of the vote.

ARTICLE 45. — The denunciation of the present Convention shall take effect with regard only to the State which shall have given notice of it. Such notice shall not be given before January 1st, 1922 (nineteen hundred and twenty-two), and the denunciation shall not take effect until at least one year after the giving of notice.

Notices under this article shall be given to the Ministry of Foreign Affairs of the French Republic, who shall communicate them to the contracting States.

Adjoined to the Convention are several annexes and appendices dealing with such subjects as the marking and registration of aircraft, with airworthiness, log-books, and rules of the air. These rules follow those of navigation by sea in many respects. For example, the lights to be carried by an aeroplane are a white headlight and a white light aft, with red and green lights for port and starboard. Airships have all those lights doubled, while balloons carry a single light below the car. Heavier-than-air machines give way to balloons and airships. The sea rule also applies to motor-driven aircraft meeting end on — each turns to the right.

Regulations for granting pilots' certificates are dealt with, as are the rules for making international and local maps, the character of ground marks, collection and reporting of meteorological information, and customs.²

At the outset it is obvious that an international convention is a great step forward in the solution of the difficult and baffling problems of aerial navigation. Theorists upon the subject of the sovereignty of the air were in hopeless disagreement when the great war began in 1914. One reason of this was that the practical solutions derived from what were then the two principal theories were in most instances the same. The view that each state was absolutely sovereign over the air space above, especially if tempered by acknowledgment of the right of innocent passage to aircraft of all nations, did not in its actual applications differ much from the view that the air is free to all nations subject to the right of each state to protect itself from

² For the appendices, which are quite technical, see the Senate Document above referred to.

injury from aircraft. Everybody then favored the liberal use of the air by all nations. The choice between theories depended in a measure upon the individual sympathy, whether for imperial dominion and the power of the strong states, or for the largest human freedom and the rights of the weak states. The results of the two theories are not, however, exactly the same, as indeed the draft of the International Flying Convention now discloses. In the nature of things, a treaty cannot be regarded as settling the matter of theory once for all, — first, because sovereign states are free to contract with one another to waive a portion of their air rights; and, secondly, because treaties bind only those nations which are parties to them. Article 39 also reserves to the parties to the Convention freedom of action in case of war, either as belligerents or as neutrals. The latest form of English theory, however, would deny altogether the right of innocent passage originally suggested by Westlake, and recognized by the Institute of International Law.³

In a recent article,⁴ Dr. Hugh H. L. Bellot supports this view of absolute sovereignty of the air space over land and territorial waters free from any right of innocent passage, however restricted, in favor of aircraft of foreign nations. This theory of absolute sovereignty is the one upon which the war was conducted, so the author claims,⁵ and the only one that can expect acceptance by the powers. It cannot fairly be said that the recent usages of war have denied the right of innocent passage in time of peace. It will be observed that this doctrine denies to foreign nations in territorial air space even as much right as they now have in territorial waters, where confessedly the adjacent states have sovereignty. Now that

³ References to the earlier literature of the subject may be found in a previous article on "Sovereignty of the Air," 7 AM. J. INT. LAW, 470 (1913). For a bibliography of the literature before 1913 see WECK, *DEUTSCHES LUFTRECHT*, (1913), viii.

⁴ "The Sovereignty of the Air," 3 INT. LAW NOTES, 133 (December, 1918); the same conclusion, on purely theoretical grounds, is reached by Sr. Ortiza in "La condicion juridica del Espacio Aereo," a thesis for the doctor's degree (Valencia, 1913).

⁵ Professor Rolland puts the case more conservatively in his important article, "Les pratiques de la guerre aérienne dans le conflit de 1914 et le droit des gens," 23 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC*, 497 (1916). Note, however, the text cited, beginning at page 576. The war seems to have left at least as much of the freedom of the air as it has of the freedom of the seas. Mr. J. E. G. Montmorency, in 17 J. SOC. COMP. LEG. (N. S.) 172 (1917), prepares for us a legal theory of the appropriation of parts of the high seas.

the international law upon this subject is in the making, the need is not for a theory that will be acceptable to the strong nations, who can take care of themselves very well, but for one that will be just to all, especially to the weak ones, who can find no other protection than the law. Attention is also called to a valuable article⁶ by Professor H. D. Hazeltine of Cambridge University, written from the same point of view, and discussing the reports of the English Civil Aerial Transport Committee presented to the Air Council (Cd. 9218), which are full of interesting material. Great Britain is sea girt, and her dominions have remarkable access to the ocean. She has had comparatively little reason to support the doctrine of the liberty of the air, but rather to fear it. It would be almost as unreasonable to expect her jurists to think otherwise on this subject as to expect them to champion "the freedom of the seas."

The doctrine of the right of innocent passage of Westlake is the irreducible minimum of the doctrine of the liberty of the air of Fauchille. At the beginning of the present war, the principle of the liberty of the air was in excellent standing. It was supported by many distinguished jurists. It had been accepted by the Institute of International Law and by the various international legal conferences called to consider the subject of aviation.⁷ In every assembly of jurists, aerial liberty had commanded a good working majority. The conduct of the war has indeed recognized the sovereignty of states over the superjacent air space for military purposes. Civil aviation has been forbidden altogether by belligerent states. Neutral states have forbidden belligerent aircraft to fly over their frontiers (a measure indeed necessary also for their own protection against air fights), and have interned the crews and equipage of *military* aircraft violating such orders, following the analogy of the laws of warfare upon land where soldiers of belliger-

⁶ "The Law of Civil Aerial Transport," J. OF COMP. LEG. AND INT. LAW, 3d Series, Vol. I, Part I (April, 1919), 76.

⁷ For example, see "L'accord Franco-Allemand du 26 juillet, 1913, relatif à la navigation aérienne," by Prof. Louis Rolland, 20 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, 697, 708 (1913); "Le vie del mare e dell' aria e il diritto internazionale," 7 REVISTA DI DIRITTO INTERNAZIONALE (2d Series), 153, 177, by Professor Enrico Catellani (Padua), author of IL DIRITTO AEREO (Turin, 1911). As late as 1911 Professor Hans Sperl (Vienna) was able to say that the principle of the complete liberty of aerial passage was not disputed by any one: "La navigation aérienne au point de vue juridique," 11 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, 478, note 2, of the French translation.

ent nations march over the border. But has an end been made to liberty of the air altogether? Is the great ideal of every city a port and every sky a sea to be definitely abandoned?

No theory, and certainly no treaty, which involves an universal surrender of a human right hitherto generally maintained by jurists in all parts of the civilized world should be accepted lightly. Chapter I, Article 1, of the Convention apparently is based upon the English view:

"The contracting States recognise that every State has complete and exclusive sovereignty in the air space above its territory and territorial waters."

Here speaks the experience of the great war. The possibility of the domination of the air space by cannon, or at least of so much of the air space as is practically useful and desirable for aviation, has been demonstrated. The standard of determination for aviation should be, not what is scientifically possible in heights of extreme cold and great atmospheric tenuity, but what is in practice suitable for use in the ordinary affairs of mankind, particularly for commerce. The air space may now fairly be considered as much subject to physical domination, at any rate, as are territorial waters, and there is a similar argument of the need of the adjacent state to exercise powers of protection.

In Article 2 apparently we hear the voice of France:⁸

"Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters . . . to the aircraft of the other contracting States. . . ."

Article 3 provides that a state may, for military reasons or in the interest of public safety, prohibit aircraft of other states from flying over certain areas of its territory, but it must make no discrimina-

⁸ For example, one is referred to the article by Prof. A. Merignhac entitled "*Le domaine aérien privé et public, et les droits de l'aviation en temps de paix et de guerre*" in 21 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC*, 205 (1914). The doctrine of the liberty of the air has been much favored in the French literature of the subject. The Germans, at least before the recent war, generally favored the more imperialistic view of the absolute sovereignty of the underlying state. See Dr. Franz Scholz, "*Die seekriegsrechtliche Bedeutung von Flottenstützpunkten*," second supplement to 11 *ZEITSCHRIFT FÜR VÖLKERRECHT*, 84, note 1 (Breslau, 1918). But they were already beginning to appreciate the value of air transit over other states. Possibly there will be a reaction from this former theory in the future in Germany in the interest of commerce, especially if Germany is not permitted to sign the Convention.

tion in this respect between its own private (as distinguished from public) aircraft and those of the other contracting parties. On no theory could objection properly be made to this article. The war has proved the necessity of such a provision as this.

Article 5, however, provides that—

“No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.”

If all nations are contracting states this article is unobjectionable. But some confessedly may be excluded, at least for a term of years, and admitted then only by a three-fourths vote (Article 44). Here is a positive agreement to exclude the aircraft of certain nations from passage at all.

An examination of the globe discloses a number of states which have no maritime boundary, such as the new Austria and new Hungary, Czecho-Slovakia, Poland, Switzerland, Bolivia, Paraguay, not to mention Abyssinia, Afghanistan, and Thibet. Are such countries as these to have no commercial aviation with other nations except as a matter of grace? Not even a “way of necessity”? Or must the winding courses of international rivers, where such rivers exist, be followed to the sea? An air line is supposed to be straight. Can the payment of customs duties be imposed or tolls charged, in case of states which do not happen to be contracting parties to the Convention, for transit of their airships over the air space of other states? Must commercial airships flying from America to Scandinavia avoid passing over Great Britain? Will airships be denied the use of trade winds of the higher air levels? Whatever reduces by prohibition the sum of human rights everywhere is worthy of consideration. Nothing that touches the universal life of humanity is unimportant. If, as every one hopes and many believe, commercial aviation will be an important factor in the future life of nations, states excluded from the Convention have here a very serious ground for objection, and may fairly claim that they are denied the common rights of mankind. Just when a relief had at last been found by human ingenuity for the isolation of the last communities, and a way had been opened to the remotest spots of earth, here is a treaty which undertakes to deny the relief and to close the way, except to signatory nations. Switzerland should have of common right commercial access to the sea and to states

not adjacent by the air, and not be dependent for it upon the consent of other nations. The notion that the adjacent surrounding countries may forbid entirely the innocent passage of Swiss commercial aircraft cannot fairly be based upon the idea that this result is requisite for the safety of these countries, for everybody knows better. Nations not parties to the Convention ought to seek admission to it, and if it is denied, they are entitled to feel that their citizens have less rights than other men and are denied a substantial part of human freedom. Such states ought not to submit without protest. Only military reasons can be sufficient for such an exclusion as this. We must not let "great captains with their guns and drums disturb our judgment" but "for an hour," and expect the "patient, wise, far-seeing" jurist of the future to look at this question in a different way.

In the last paragraph of Article 15 we find:

"The establishment of international airways shall be subject to the consent of the States flown over."

In the same article it is earlier provided that—

"Every aircraft of a contracting State has the right to cross another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place."

The use of aerodromes is guaranteed by Article 25 upon terms of equality which will rejoice advocates of the liberty of the air. Taking the two quotations from Article 15 together, it may be assumed that the air space cannot be closed to through transit altogether, under conditions of peace. No state should have the right to forbid international airways entirely. If Switzerland is a party to the Convention, it should not have the right in times of peace to close every pass through the Alps to the passage of aircraft. This would, to say the least, deny to travelers the possibility of a sublime experience. It might seriously affect legitimate trade and important mails. Undoubtedly a state should have the right to exclude the passage of military aircraft over any areas, and of commercial aircraft over military areas, or populous communities, but not the right to bar the way altogether. High mountains and deserts as well as perilous seas, jungles, and savage communities limit the passage of aircraft. To add artificial and unnecessary legal barriers would be to create international grievances and add a new terror to

isolation. Free traders feel a natural repugnance to this sort of thing. It requires no great ingenuity to conceive of many articles which could be conveniently transported by air, such as the mails, dyes, medicines, instruments, jewels, lace, securities, and many more. The newspapers tell us already of a daily express service between London and Paris at a guaranteed speed of over a hundred miles an hour.

In Article 23 we have an excellent solution of the question of jurisdiction over legal relations. As between persons on board of aircraft, the nationality of the aircraft governs, in case of flight without landing. The analogy of the ship at sea is followed. This article, like Article 18 in regard to infringement of patents, and Article 33 in regard to extraterritoriality, is not consistent with the theory of absolute sovereignty of the underlying state. Power is given the state beneath to protect its military and fiscal laws, and the public safety, and to regulate air navigation.⁹ By Article 33 military aircraft, only if voluntarily admitted, enjoy the privilege of extraterritoriality. By Article 34 the privilege is denied to police and customs aircraft, even though *admitted by agreement*.

In Article 35, the control of the International Commission for Air Navigation is definitely committed to Great Britain, the United States, France, Italy, and Japan, although provision is made for representation of each contracting party. We see here that it is a treaty for peace we are considering, and that the negotiators have been concerned with military safety and national punishments as preliminary to the future of a world at peace. Suitable provision is made for amendments to the Convention. Article 38 provides for international arbitration, but Article 39 provides:

"In case of war, the provisions of the present Convention do not affect the freedom of action of the contracting States either as belligerents or as neutrals."

No specific number of states are required to ratify. Liberal provision is made by Articles 43 and 44 for the admission of states to the Convention; nevertheless a state which participated in the present war but not in the negotiation of the Convention, unless a member of the League of Nations, can be admitted only by unani-

⁹ The rules in case of territorial waters will be found analogous. 1 WESTLAKE INTERNATIONAL LAW (1910), 193.

mous vote until January 1, 1923, and after that date only by a three-fourths vote so counted as to give the Entente Powers the control. There is here the possible opportunity for injustice to be done, and these provisions have undoubtedly a military basis.

By Article 45, a state may withdraw from the Convention after January 1, 1922, by giving a year's notice.

It is impossible to examine the recent legal literature of aviation without noticing that the actual development of the art of flying has increased the necessity for police regulation to an extent entirely unexpected, and that the result has been to compel much more general recognition of the right of the state to regulate the entire air space overhead. The recent frightful accident at Chicago, where a burning airship fell through the roof of a bank, doing great injury to life and property by the explosion of gasoline contained in its fuel tanks, emphasizes this necessity of regulation in peace, while the great conflict has made the same necessity very clear in war.¹⁰ More and more limitations have been found necessary to be placed upon the liberty of the air. But the right freely to navigate the air upon commercial errands must not perish from the earth; the air space must not be made a field for national monopoly; peaceful access to the sea and to other nations through the air must be preserved and protected, not surrendered to the will of the strongest. The necessity for international air routes with the necessary aerodromes will become more and more apparent every day.

Of the three theories of the legal status of the air space, one follows the analogy of the high seas, one that of territorial waters, one that of the land. The advocate of each theory will find something in the Convention which is countenanced by his theory; none of the three theories is consistent with the entire Convention. The analogy of the land has been followed most.

In this connection it is interesting to note that the new German Constitution of July 31, 1919, by Article 7, Section 19, confers upon the national government the right of legislation over communication by vehicles propelled by power in the air. Subject to the veto of the national government the separate states may act

¹⁰ "Flying over populous centres has been prohibited since the entry of Marshal Pétain into Metz, when an aviator, flying low over a crowded square where a review was to take place, struck a telegraph wire and fell into a crowd, killing half a dozen persons." *NEW YORK TIMES*, October 13, 1919.

in the absence of national legislation (Article 12). Before the recent war Germany was well advanced in commercial aerial navigation. Great Britain, we know, cherishes great designs for rapid long-distance communication through the air. We will say also of England's ruler,—

"His state
Is kingly; thousands at his bidding speed,
And post o'er land and ocean without rest."

But in this instance civilization will not be served by having any nation "only stand and wait."

After all, the normal state of mankind is peace, not war; and in peaceful times no nation is likely to find the right of flying across other countries more valuable than England.

In spite of all criticism, this Convention would be an important gain to humanity, and its adoption would be a great step in placing international aviation upon a legal basis, and hastening the commercial conquest of the air. The law was made for man, and not man for the law. Even if the Convention plays havoc with excellent juristic theories, we must be prepared to sacrifice logic for the peace of the world, and to accept that which can be made better, rather than stand out for an impossible perfection. If the present Convention is the result of the recent experiences of war, we may reasonably expect victories of peace, no less renowned, to come later. Defects which actual experience indicates to exist will be corrected, and if the Convention has obstructed unnecessarily the aerial domain, doubtless more freedom will come in due time. Indeed, when all nations applying for admission have been admitted, it will be hard to find serious fault with the Convention as it stands, and we may expect all to sound its praises.¹¹

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¹¹ According to Press Dispatches from Paris, October 14, 1919, the Convention was signed by the representatives of many countries on the 13th, but representatives of the United States were allowed six months for further consideration. It is stated that the American Patent Office questioned whether under the Convention the United States courts would have jurisdiction if foreign machines carried devices infringing United States patents. Compare Article 18.